Filed 6/4/12 ASAP Copy and Print v. Ringgold CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ASAP COPY AND PRINT et al.,

Plaintiffs, Cross-complainants, and Appellants;

NINA RINGGOLD,

Appellant,

v.

CANON BUSINESS SOLUTIONS, INC., et al.,

Defendants, Cross-defendants, and Respondents;

GENERAL ELECTRIC CAPITAL CORPORATION,

Defendant, Cross-complainant, and Respondent;

HEMAR ROUSSO & HEALD,

Cross-defendant and Respondent.

B224295, B225702

(Los Angeles County Super. Ct. No. PC043358)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara Marie Scheper, Judge. Case No. B224295 is affirmed as modified. Case No. B225702 is affirmed.

Nina Ringgold, in pro. per., and for Plaintiffs, Cross-complainants and Appellants.

Dorsey & Whitney, Kent J. Schmidt and Lynnda A. McGlinn for Defendant, Cross-defendant and Respondent Canon Business Solutions, Inc.

Frandzel Robins Bloom & Csato, Andrew K. Alper and Alan H. Fairley for Defendant, Cross-defendant and Respondent Canon Financial Services, Inc.

Hemar, Rousso & Heald, Jeannine Del Monte Kowal for Defendant, Cross-complainant and Respondent General Electric Capital Corporation.

Appellants ASAP Copy and Print and Ali Tazhibi dba ASAP Copy and Print (collectively ASAP) appeal from the dismissal of their action and cross-action against respondents Canon Business Solutions, Inc., previously known as Canon Business Solutions-West, Inc. (CBS), Canon Financial Services, Inc. (CFS), General Electric Capital Corporation (GE), and Hemar, Rousso and Heald LLP (Hemar). The trial court dismissed both actions after it sustained demurrers to the Fourth Amended Complaint without leave to amend, struck ASAP's Fifth Amended Complaint, and struck or sustained a demurrer without leave to amend to ASAP's First Amended Cross-complaint.

In connection with this litigation, the trial court also sanctioned ASAP's trial counsel and awarded attorney's fees in favor of respondents as prevailing parties. ASAP's trial counsel, who continues to represent ASAP in this appeal, designates herself as an additional appellant insofar as the appeal challenges the trial court's award of sanctions against her personally.

ASAP filed two appeals in this matter, case Nos. B224295 and B225702. The first appeal primarily challenges various trial court rulings concerning (1) the legal sufficiency of ASAP's multiple complaints and cross-complaints and (2) a request for production of documents served by ASAP upon GE. The second appeal primarily challenges issues related to the trial court's (1) award of attorney's fees and (2) refusal to hear various motions filed or pending hearing after ASAP filed its first notice of appeal. For purposes

of oral argument and this opinion, this court previously ordered the two cases consolidated.[1]

In the combined appeal, ASAP contends the trial court erred by (1) sustaining the demurrers of CBS, CFS and GE to the Third Amended Complaint without leave to amend the second, third, fourth, fifth, and seventh causes of action; (2) sustaining the demurrers of CBS, CFS and GE to the Fourth Amended Complaint in its entirety without leave to amend; (3) striking the Fifth Amended Complaint in its entirety; (4) making various adverse rulings related to discovery produced or objected to by GE; (5) striking or sustaining demurrers without leave to amend to ASAP's First Amended Cross-complaint and imposing sanctions against ASAP's trial counsel in relation thereto; (6) denying ASAP's ex parte application filed April 15, 2010; (7) taking off-calendar various motions or applications filed or pending hearing after ASAP filed its first notice of appeal; (8) making various adverse rulings related to the award of attorney's fees; and (9) determining that ASAP forfeited its jury fee deposit. Finally, ASAP contends that the various rulings challenged on appeal should be reversed because the court below demonstrated actual bias against it.

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[1] In connection with these appeals, ASAP also filed various other requests or "applications." ASAP's request for judicial notice is granted insofar as it seeks to augment the record with motions, applications, oppositions, orders, or other documents filed in the public part of the trial court file. ASAP's request for judicial notice is denied to the extent it seeks to incorporate documents obtained through discovery, subject to a trial court protective order, and not filed in the public part of the court file. As we explain in this opinion, ASAP failed to articulate to the court below and fails to articulate to this court the relevance of these sealed documents. Any sealed documents lodged by ASAP with this court in connection with this request are ordered returned. ASAP referenced a "writ of coram vobis" in the middle of its request for judicial notice. This writ is not separately filed. Moreover, it is not adequately supported by specific legal authority, references to the record, or cogent legal argument, as is required. It is therefore not properly before us and will not be considered. (See *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522 (*McComber*); *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 (*Kim*).) Finally, ASAP also filed a request to unseal the various discovery documents that are subject to the trial court's protective order. That request is denied, largely for the same reasons that we decline to take judicial notice of documents themselves.

With one minor exception, we find no error in the trial court's rulings and affirm the judgment below.

FACTUAL HISTORY

On August 29, 2002, ASAP acquired a single Canon photocopier from CBS. The written acquisition agreement executed by ASAP and CBS included provisions for maintenance and servicing of the photocopier.

ASAP and CFS signed a separate written agreement to finance the acquisition as a lease for a term of 60 months at $533 per month. The contract with CFS also contained an option to purchase the photocopier for an additional final payment of $4,244.77 at the end of the 60-month term. The lease agreement was a double-sided document. The second page contained an assignment clause and a provision for attorney's fees in the event of litigation. It also contained a maintenance agreement wherein CFS designated CBS as its agent for service and maintenance.

On August 3, 2005, CFS exercised the assignment clause and assigned the lease to GE for collection. It also sent ASAP notice of the assignment. On December 1, 2005, ASAP stopped making payments on the lease.

Although the language of the various complaints in this case is not always clear, it seems that ASAP claims that (1) CBS and CFS were one entity, (2) GE was acting in concert with them, (3) CBS failed to provide the promised maintenance and supplies, and (4) CFS assigned the lease to GE to collect lease payments despite CBS's nonperformance of the maintenance agreement.

This simple dispute generated a trial record in excess of 9,000 pages. Although ASAP's claims were ultimately dismissed or stricken by the trial court after demurrers or motions to strike, it took nearly two years to reach this resolution. The current appeal consists of three appellants' briefs (two opening and one reply) and six respondents' briefs, totaling over 365 pages. The consumption of resources by this unremarkable lawsuit is largely attributable to the inefficient and ultimately unsuccessful way in which ASAP's counsel chose to litigate it, at both the trial and appellate levels.

PROCEDURAL HISTORY

Although ASAP's contentions on appeal focus on trial court rulings beginning with the Third Amended Complaint, events prior are relevant to some of the issues raised. Thus, a lengthy procedural history follows.

1. The Original Action

ASAP's original complaint alleged seven causes of action against CBS, CFS, and GE: (1) breach of contract and the covenant of good faith and fair dealing; (2) unfair business practices; (3) fraud and fraudulent nondisclosure; (4) intentional misrepresentation; (5) negligent misrepresentation; (6) declaratory relief; and (7) equitable relief. Before serving the original complaint, ASAP filed and served its First Amended Complaint, which alleged the same seven causes of action against the same three parties. Neither of these complaints attached the written agreements as exhibits and neither described the terms of the agreements except in the most general of terms.

Both CBS and CFS demurred to the First Amended Complaint. GE, however, did not timely respond and ASAP obtained entry of default against it.

The trial court sustained CBS's demurrer to the First Amended Complaint with leave to amend. Approximately one month later, the trial court sustained CFS's demurrer, also with leave to amend. Because of the gap in time between the two demurrer hearings, ASAP first filed a Second Amended Complaint against CBS only, and then a Third Amended Complaint against the same three parties.

ASAP's Third Amended Complaint continued to allege the same seven causes of action against all three parties. In support of the Third Amended Complaint, ASAP did attach copies of the acquisition agreement with CBS and the first page of the double-sided lease agreement with CFS as exhibits. ASAP alleged that it had never seen nor received the back side or second page of the lease agreement with CFS.

CBS and CFS demurred to the Third Amended Complaint. After obtaining relief from entry of default, GE rejoined the litigation and also demurred.

The trial court sustained all three demurrers *without* leave to amend as to the second, third, fourth, fifth, and seventh causes of action. The court sustained all three demurrers to the first cause of action, for breach of contract, but gave ASAP 10 days leave to amend. The court overruled the demurrers to the sixth cause of action for declaratory relief. The trial court also granted CBS's motion to strike ASAP's prayer for punitive damages.

Thereafter, ASAP filed its Fourth Amended Complaint. It alleged the remaining two causes of action for breach of contract and declaratory relief. It still contained, however, the fraud assertions previously alleged in support of the now dismissed tort causes of action. CBS, CFS, and GE all filed demurrers to this complaint.

ASAP never responded to the demurrers. Instead, before the demurrers could be heard and without leave of the trial court, ASAP filed its Fifth Amended Complaint, again alleging breach of contract and a request for declaratory relief. The Fifth Amended Complaint, like its predecessor, still contained the fraud assertions previously alleged in support of the dismissed tort causes of action. The trial court issued an order to show cause why the complaint should not be stricken and set a hearing date.

Prior to the hearing date on the order to show cause, the trial court heard and sustained – without leave to amend – all three demurrers to the Fourth Amended Complaint.

At the order to show cause hearing, the trial court struck the Fifth Amended Complaint and ordered it dismissed.

2. The Cross-actions

During the litigation described above, the parties were simultaneously litigating various cross-actions.

After its relief from entry of default, GE filed a cross-complaint against ASAP for (1) breach of written agreement; (2) claim and delivery; (3) account stated; and (4) unjust enrichment. The cross-complaint alleged that ASAP entered the *lease* agreement with *CBS* and that *CBS* later assigned that agreement to GE. ASAP demurred to the cross-complaint, arguing in part that the copy of the lease attached to GE's cross-complaint showed that the lease agreement was between ASAP and *CFS*, not ASAP and *CBS*.

Before ASAP's demurrer to the cross-complaint was heard, GE filed its First Amended Cross-complaint. The amended cross-complaint continued to allege the same four causes of action against ASAP, but corrected the allegations to show a lease agreement between ASAP and CFS and an assignment of that agreement from CFS to GE.

ASAP demurred to GE's First Amended Cross-complaint. The trial court overruled the demurrer except as to the second cause of action for claim and delivery, which it found to be a remedy only. ASAP subsequently answered the balance of GE's First Amended Cross-complaint.

On the same day it filed its answer, ASAP filed its own cross-complaint against CBS, CFS, GE, and Hemar, GE's attorney of record. ASAP's cross-complaint alleged eight causes of action: (1) abuse of process against GE and Hemar; (2) violation of the Fair Debt Collection Practices Act (15 U.S.C. § 1692 et seq.) against all cross-defendants; (3) intentional interference with prospective economic advantage against GE; (4) negligent interference with prospective economic advantage against all cross-defendants; (5) fraudulent or negligent transfer against CFS; (6) fraud in the inducement against CBS and CFS; (7) unjust enrichment against CBS and CFS; and (8) mistake against all cross-defendants. In support of these various cross-claims, ASAP alleged the same facts – using virtually the same language – as previously alleged in support of the dismissed tort causes of action contained in the Third Amended Complaint.

Later, ASAP filed a First Amended Cross-complaint against CBS, CFS, GE, and Hemar. This cross-complaint dropped the claim for violation of the Fair Debt Collection Practices Act, but added another cause of action for equitable and implied contractual indemnity against all four cross-defendants. It continued to allege its causes of action using largely the same facts and language used in support of the previously dismissed tort causes of action contained in the Third Amended Complaint.

CBS, CFS, GE, and Hemar demurred to ASAP's First Amended Cross-complaint. CBS and CFS also moved to strike ASAP's First Amended Cross-complaint in its entirety while GE and Hemar moved to strike the abuse of process claim only. All four

respondents requested sanctions pursuant to Code of Civil Procedure section 128.7.[2] In connection with their motion to strike the first cause of action, GE and Hemar also sought sanctions pursuant to section 425.16, subdivision (c)(1).

On three successive days, the trial court heard the demurrers to and motions to strike ASAP's First Amended Cross-complaint. The trial court granted the motions to strike filed by CBS and CFS, and deemed their demurrers moot in light of that ruling. The court also granted the motion to strike the abuse of process claim filed by GE and Hemar. The court also sustained, without leave to amend, the demurrer filed by GE and Hemar. Finally, the court sanctioned ASAP's trial counsel in the amounts of $5,977.37 to be paid to counsel for CBS, $8,200 to be paid to counsel for CFS, and $7,110 to be paid to counsel for GE.

Shortly thereafter, GE voluntarily dismissed its own cross-action against ASAP, effectively terminating the last remaining claims in this unwieldy litigation.

3. Postdismissal Litigation

After dismissal of the original action and cross-actions, CBS, CFS, and GE sought awards of attorney's fees and costs pursuant to contract. ASAP also continued to file various documents: a notice of intention to move for a new trial and to vacate judgment and orders; a motion to vacate orders and to unseal; and points and authorities in support of the motion to vacate judgment and orders. On April 30, 2010, ASAP filed its first notice of appeal. The trial court continued to hear litigation with respect to the issues of attorney's fees and costs, but ordered other motions filed by ASAP off-calendar because of the notice of appeal.

On June 21, 2010, the trial court awarded CBS $129,048.78 in attorney's fees and $3,518.75 in costs. That same day, the trial court also awarded CFS $83,232 in attorney's fees and $5,955.29 in costs. ASAP filed its second notice of appeal on July 2, 2010. On July 12, 2010, the trial court awarded GE $66,146.36 in attorney's fees and $699.75 in costs.

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[2] All undesignated section references are to the Code of Civil Procedure unless otherwise stated.

DISCUSSION

A. The Demurrers to the Third Amended Complaint

ASAP initially argues, on various grounds, that the trial court improperly sustained the demurrers of CBS, CFS and GE to the Third Amended Complaint. These contentions are without merit.

We first address ASAP's procedural challenges.

1. Timeliness

ASAP first contends that the demurrers were not timely filed and therefore should not have been heard. We disagree.

ASAP filed its Third Amended Complaint on June 19, 2009. It served all CBS, GE, and CFS, by mail, the same day. CBS, GE, and CFS filed their demurrers on July 1, July 10, and July 20, 2009, respectively. ASAP contends that the demurrers should have been filed within 10 days, or no later than June 29, 2009, as required by California Rules of Court, rule 3.1320(j)(2).

In its oppositions to the demurrers below, ASAP did not raise the issue of timeliness. The contention is therefore waived. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846.)[3] Moreover, a trial court has discretion to consider a late filing so long as it does not prejudice the opponent or otherwise affect his or her substantial rights. (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 281-282.) ASAP made below and makes here no attempt to show how hearing the demurrers affected its substantial rights or caused it unfair prejudice. Thus, whether the demurrers in this case were or were not timely, the trial court had discretion to hear them.

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[3] California Rules of Court, rule 3.1320(j) requires an answer or other responsive pleading to "the complaint or the remaining causes of action" within 10 days of the overruling of a demurrer, the expiration of the time to amend if the demurrer is sustained with leave to amend, or the sustaining of the demurrer if leave to amend is denied. A fair reading of the rule's language suggests that its 10-day requirement does *not* apply where, as here, a demurrer is sustained, the plaintiff is given leave to amend, and the plaintiff actually exercises the option to amend. In that situation, it would appear that the defendant has 30 days to answer or otherwise respond to the amended complaint. (See Code Civ. Proc., §§ 412.20, subd. (a)(3), 430.30, 471.5.) We need not formally decide this issue, though, since ASAP has waived it.

2. Judicial Notice of GE's Cross-complaint

ASAP next argues that the trial court erred by refusing to take judicial notice of GE's original cross-complaint when deciding the demurrers. We find ASAP's argument unpersuasive.

ASAP asked the trial court to judicially notice GE's original cross-complaint insofar as it alleged that ASAP and *CBS*, rather than ASAP and *CFS*, had entered the lease agreement. ASAP contends that this fact was material to the trial court's decision on the demurrers because it conflicted with CBS's assertion, in its demurrer, that the lease agreement was between ASAP and CFS.

A demurrer tests only the legal sufficiency of the complaint. When deciding a demurrer, the court cannot consider matters outside the complaint unless properly subject to judicial notice. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 (*Donabedian*).) Evidence Code section 452, subdivision (d) permits a trial court to judicially notice its own files.

Contrary to ASAP's contention on appeal, the trial court did take judicial notice of GE's original cross-complaint in the context of the CBS demurrer. Although the record is not entirely clear, it also appears that the trial court judicially noticed the cross-complaint in connection with the demurrers of CFS and GE.

Even if we assume that the trial court failed to take judicial notice, ASAP never identifies the specific causes of action that would have been saved had the court taken judicial notice, nor gives its reasoning why judicial notice would have prevented their dismissal. In this regard, ASAP only states that CBS, in its demurrer, asserted that a lease agreement existed between CFS and ASAP while GE, in its original cross-complaint, alleged that the agreement was between CBS and ASAP. ASAP then concludes – without explanation – that because "respondents were taking inconsistent positions[,] information was concealed from ASAP."

Other than the entirely conclusory statement described above, ASAP at no point articulates its theory how these discrepancies establish a cause of action on the face of the Third Amended Complaint. A reviewing court is not required to make an independent, unassisted study of the record in search of error. (*McComber, supra*, 72 Cal.App.4th at

p. 522.) If a party fails to provide legal argument or citation to the record on a point raised, the court may treat it as waived. (*Ibid*.; accord, *Kim*, *supra*, 17 Cal.App.4th at p. 979 [arguments unsupported by citation to the record or made only in conclusory form may be treated as waived].) Since ASAP fails to articulate its argument on this issue, we deem this contention waived.

Additionally, as mentioned above, upon receipt of ASAP's demurrer to the original cross-complaint, GE promptly filed its First Amended Cross-complaint, the apparent purpose of which was to correct the mistaken allegation that ASAP and *CBS* had entered the lease agreement and instead allege that ASAP and *CFS* had entered the lease agreement. Under the circumstances, it is apparent that the allegation in the original cross-complaint was an inadvertent error rather than evidence of a nefarious scheme to hide matters from ASAP.

In support of its argument that the trial court erred by not judicially noticing GE's original cross-complaint, ASAP also contends that documents produced by GE during discovery show "the existence of the False Lease Assignment and that GE never had been assigned a lease from a transaction involving ASAP on August 29, 2002 or any other date." As discussed below, we fail to see how this is relevant to a trial court's decision on a demurrer.

Discovery documents, unless actually described in a complaint, are not part of the complaint. Moreover, generally speaking, discovery documents are not properly subject to judicial notice. (See Evid. Code, § 451 et seq.) Since ASAP did not describe the documents in the allegations of the Third Amended Complaint and since, under the immediate circumstances, we see no basis for them to be judicially noticed, they are wholly irrelevant to issues raised by a demurrer. (See *Donabedian*, *supra*, 116 Cal.App.4th at p. 994.) The trial court did not err.

Next, we address ASAP's substantive challenges.

3. The Breach of Contract Claim

ASAP next contends that the trial court improperly sustained demurrers to the first cause of action – for breach of contract – in the Third Amended Complaint. We find that ASAP has waived this contention.

When a trial court sustains a demurrer but grants leave to amend, the plaintiff waives any trial court error with respect to causes of action which are subsequently amended. (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312.) Only the sufficiency of claims which are not amended can be litigated on appeal. (*Ibid*.)

After sustaining the demurrers to the breach of contract cause of action in the Third Amended Complaint, the trial court granted ASAP leave to amend. ASAP exercised this option when it filed its Fourth Amended Complaint and included the amended breach of contract cause of action. Accordingly, ASAP has waived its right on appeal to assert the legal sufficiency of this claim as alleged in the Third Amended Complaint.

4. The Unfair Business Practices Claim

ASAP next argues that the court below erred when it sustained demurrers to the second cause of action, an allegation of unfair business practices and false advertising pursuant to Business and Professions Code sections 17200 et seq. and 17500 et seq. This contention lacks merit.

The decision to sustain a demurrer is reviewed de novo. (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166.) The issue on appeal is whether the complaint alleges *facts* sufficient to state a cause of action. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126; see also § 430.10, subd. (e).) The reviewing court accepts as true all material and properly pleaded facts, but must disregard "opinions, contentions, deductions, or conclusions of fact or law alleged." (*Smyth v. USAA Property & Casualty Ins. Co.* (1992) 5 Cal.App.4th 1470, 1473 (*Smyth*).) The reviewing court may also consider matters properly subject to judicial notice. (*Donabedian*, *supra*, 116 Cal.App.4th at p. 994.) A plaintiff who alleges unfair business practices must state the facts supporting such claims with reasonable particularity. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619 (*Khoury*).)

Although not entirely clear, ASAP's second cause of action seems to allege that (1) CBS and CFS are one entity; (2) CBS and CFS, acting in concert with GE, engaged in a marketing scheme whereby they enticed business owners to acquire and use Canon

copiers based upon the promise of free maintenance and supplies; (3) the marketing scheme was deceptive because CBS and CFS never intended to provide the free maintenance and supplies; (4) when the "scheme" became unprofitable, CBS and CFS assigned the agreements to GE for purposes of collection only, knowing that GE could not provide the promised maintenance and supplies; (5) CBS and CFS indemnified GE from any loss; and (6) the scheme was intended to eliminate competitors who could provide stable service and supplies.

Aside from whether the above, generally speaking, describes a cause of action for unfair business practices, a more significant problem arises because ASAP fails to support any of these general conclusions with any particular facts. The Third Amended Complaint provides no factual description whatsoever of the alleged marketing campaign. It supplies no factual support for its apparent allegation that GE was acting in concert with CBS and CFS. It presents no facts in support of its allegation that CBS never intended and ultimately failed to provide the service and supplies required under the maintenance contract. It lacks facts in support of its allegation that CFS improperly assigned the lease agreement to GE in order to allow CBS to avoid providing maintenance and supplies. It offers no theory why assignment of the lease to GE was improper or how assignment prevented ASAP from enforcing its separate maintenance contract with CBS. It alleges no facts to establish that the intent of this scheme from the beginning was to eliminate competitors. In short, the Third Amended Complaint does not allege specific facts, but only conclusions of fact, which by themselves are not sufficient to support a cause of action. (*Smyth*, *supra*, 5 Cal.App.4th at p. 1473; *Khoury*, *supra*, 14 Cal.App.4th at p. 619.) Thus, we find the trial court properly sustained the demurrer to this cause of action.

5. The Fraud Claims

ASAP next argues that the trial court improperly sustained demurrers to the third, fourth, and fifth causes of action in the Third Amended Complaint, for fraud and fraudulent nondisclosure, intentional misrepresentation, and negligent misrepresentation, respectively. Again, this contention is without merit.

Causes of action for fraud must be pleaded with particularity. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993.) The specificity requirement in fraud actions against corporate defendants means that a plaintiff must allege (1) who made the representation; (2) the basis of his or her authority to speak on behalf of the corporation; (3) to whom the representation was made; (4) what was said or written; and (5) when the oral or written representation was made. (*Tarmann v. State Farm Mut. Auto Ins. Co.* (1991) 2 Cal.App.4th 153, 157 (*Tarmann*).) Conclusory or general allegations of fraud are insufficient and the general policy of liberally construing pleadings will not be invoked to save a materially defective complaint for fraud. (*Robinson Helicopter Co., Inc. v. Dana Corp.*, *supra*, at p. 993.)

Both intentional fraud and negligent misrepresentation ordinarily require misrepresentation of a past or existing material fact. (*Tarmann, supra*, 2 Cal.App.4th at p. 158; *Richard P. v. Vista Del Mar Child Care Service* (1980) 106 Cal.App.3d 860, 865 (*Richard P.*).) Predictions of future events or statements regarding future action by some third party are opinions only, and not actionable fraud. (*Tarmann, supra*, at p. 158; *Richard P., supra*, at p. 865.) An exception occurs when a party to an agreement makes a promise to perform in the future with no intent of doing so and also intends that that promise be relied upon by the other party. (*Tarmann, supra,* at p. 159.) Fraud based on a false promise to perform in the future, however, must be intentional; there is no cause of action for negligent false promise. (*Ibid*.)

With respect to the third, fourth, and fifth causes of action, ASAP alleges the same misrepresentations. Against CBS, ASAP states in the Third Amended Complaint that:

> "CBS[,] through its representatives, including but not limited to, Louis Fernandez, Ron Kirk, and [*sic*] sales manager with initials believed to be M.M., Kathy Dempster, Carol Goodlow made representations near August 29, 2002 or thereafter. They represented that they would honor the customer service satisfaction guarantee; that maintenance, service, and supplies would be free; that there would be accurate meter readings, that business and disputes would be handled in the State of California; that CBS and CFS would not undertake any effort to prevent [ASAP] from the benefit of agreements made; and that dealings with [ASAP] would be honest and fair and consistent with the representations made at the time the agreements were signed by [ASAP]. [ASAP] later discovered these representations to be untrue in or about October 2007 or later."

We find that these allegations in no way plead fraud with the requisite specificity. With the exception of the person identified as "M.M.," the basis of the authority of alleged wrongdoers to speak on behalf of CBS is not alleged. The substance of the misrepresentations is alleged in only general terms, and simply restates general terms of the contract. Which specific statements were made by which specific persons are not identified; instead, all the alleged wrongdoers are lumped together with all the alleged misrepresentations. No specific dates are given, only that the misrepresentations occurred near or after August 29, 2002. Finally, the Third Amended Complaint does not even identify to whom – on behalf of ASAP – the representations were made. ASAP argues that specificity requirements are relaxed when the information is primarily in a defendant's control (see *Tarmann, supra*, 2 Cal.App.4th at p. 158), but does not explain how CBS would have more reason to know about misrepresentations presumably made to ASAP or its agents than ASAP. Furthermore, with respect to the negligent misrepresentation claim, the allegations, as insufficient as they are, clearly involve false promises to perform in the future. And, as stated above, there is no cause of action for negligent promise to perform. (*Id*. at p. 159.) It was not error to sustain CBS's demurrer for lack of specificity.

With respect to CFS, ASAP alleges in the Third Amended Complaint that:

> "CFS[,] through its representatives, including but not limited to, Jonathan Flounders, made representations in October 2007 concerning the documents and pages of agreements presented to [ASAP]. The documents provided to [ASAP] demonstrated that pages and terms were never disclosed and were concealed by both CBS and CFS."

Similarly, with respect to GE, ASAP alleges:

> "GE[,] through its representatives, including but not limited to, Barbara Risting and Leigh, made representations in or around October 2007, that it had no obligation to comply with the agreements [*sic*] terms of the agreements with [ASAP] including the customer service satisfaction guarantee to provide maintenance, service, supplies free of charge, and that it had no obligation to correct meter readings."

These allegations against CFS and GE are nearly unintelligible. Moreover, they do not identify the relationship between the alleged wrongdoers and the corporation he or

she is alleged to represent, the substance of the alleged misrepresentations, and to whom on behalf of ASAP the misrepresentations were made. But most importantly, many of these allegations on their face concern representations made in October 2007, over five years after the contracts in question were executed and over two years after the assignment of one of those contracts to GE. Misrepresentations made in 2007 could not have been relied upon by ASAP in 2002 when it entered the contracts at issue. (See *Agosta v. Astor* (2004) 120 Cal.App.4th 596, 603 [fraud requires justifiable reliance on misrepresentation].) The trial court properly sustained the demurrers of CFS and GE to the fraud and negligent misrepresentation causes of action.[4]

6. The Equitable Relief Claim

ASAP next contends that the trial court improperly sustained the demurrers with respect to the seventh cause of action for equitable relief. This argument is not persuasive.

Equitable relief is a cause of action reserved for those situations where damages are inadequate. (*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306.) The Third Amended Complaint alleges no particular facts or theories which even suggest that legal remedies are inadequate or that equitable relief is necessary. The trial court correctly sustained the demurrers as to this cause of action.

7. Leave to Amend

After sustaining the demurrers to the unfair business practices, fraud and fraudulent nondisclosure, intentional and negligent misrepresentation, and equitable relief causes of action, the trial court denied ASAP leave to amend as to these claims. The trial court properly exercised its discretion in doing so.

Where the trial court sustains a demurrer without leave to amend, the denial of leave to amend is reviewed for abuse of discretion. (*Schifando v. City of Los Angeles*

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[4] CBS and CFS also argue that the "economic loss rule" bars the fraud claims in this case. Having affirmed the trial court's ruling based upon a lack of specificity, we need not address this contention, except to note that tort remedies appear to be appropriate in contract cases where fraud in the inducement is *properly* pleaded. (See *Robinson Helicopter Co., Inc. v. Dana Corp., supra*, 34 Cal.4th at pp. 989-990.)

(2003) 31 Cal.4th 1074, 1081.) If it is reasonably possible that defects in a complaint can be cured by amendment, it is an abuse of discretion to refuse leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) The burden, however, is on the plaintiff to demonstrate how the complaint might be amended to eliminate defects in the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; see also *Hendy, supra,* at p. 742.) To meet that burden, a plaintiff must show (1) the way in which the complaint can be amended and (2) how that amendment will change the legal sufficiency of the complaint. (*Community Assisting Recovery, Inc. v. Aegis Security Ins. Co.* (2001) 92 Cal.App.4th 886, 895.) Further, "[w]here the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44.)

By the time of the demurrers to the Third Amended Complaint, ASAP had attempted to plead the dismissed causes of action four times. Although ASAP requested leave to amend in its oppositions to the demurrers of CBS, CFS and GE, those oppositions did not contain any additional facts that might be alleged to save these causes of action. Likewise, at the hearing on the demurrers, when faced with the court's tentative ruling sustaining them, ASAP did not orally offer the court additional facts it might allege to save these claims. In short, despite multiple opportunities, ASAP failed properly to allege these claims and gave the trial court no basis upon which to conclude that it ever could. Accordingly, it was not an abuse of discretion to sustain the demurrers to these causes of action without leave to amend.

8. CBS's Motion to Strike Punitive Damages

Along with its demurrer, CBS also moved to strike the prayer for punitive damages. The trial court granted the motion to strike after sustaining CBS's demurrer to the tort causes of action. ASAP argues on appeal that because the demurrer should have been overruled, it was also error to grant the motion to strike. Since we have affirmed the trial court's ruling on the demurrer, we likewise affirm its ruling on the motion to strike

by CBS. Without tort causes of action against CBS, there was no basis for a prayer for punitive damages.

B. The Demurrers to the Fourth Amended Complaint

As noted above, ASAP did not formally oppose the demurrers to the Fourth Amended Complaint but instead filed its Fifth Amended Complaint before the demurrers were heard. Nevertheless, ASAP contends that the trial court erred, both procedurally and substantively, when it sustained the demurrers. Again, we disagree.

Again, ASAP raises both procedural and substantive challenges to the trial court's rulings. We examine the procedural challenge first.

1. Timeliness

As it did in the context of the Third Amended Complaint, ASAP again contends that the demurrers of CBS, CFS and GE to the Fourth Amended Complaint were not timely filed.

On October 1, 2009, ASAP filed and served, by mail, its Fourth Amended Complaint. CBS and CFS filed their demurrers on October 16, 2009, while GE filed its demurrer on October 19, 2009. ASAP contends that the demurrers should have been filed on or before October 12, 2009. ASAP again cites California Rules of Court, rule 3.1320(j)(2) in support of its argument.

ASAP did not raise the timeliness issue below and it is therefore waived. (See *In re Aaron B.*, *supra*, 46 Cal.App.4th at p. 846.) Moreover, as noted earlier, the trial court had discretion to hear the demurrers even if they were not timely filed. Since ASAP has not shown that it was prejudiced in any way, we find no error whether the demurrers were timely filed or not. (*McAllister v. County of Monterey*, *supra*, 147 Cal.App.4th at pp. 281-282.) The trial court did not err by hearing the demurrers to the Fourth Amended Complaint.

Next, we address ASAP's substantive challenges.

2. The Breach of Contract Claim

ASAP contends that its breach of contract claim was properly pleaded in the Fourth Amended Complaint and it was therefore error for the trial court to sustain the demurrers to it. ASAP's argument, once again, is without merit.

A valid breach of contract claim requires all of the following: (1) the existence of a contract, (2) plaintiff's performance of the contract or excuse for nonperformance, (3) defendant's breach of the contract, and (4) damage to the plaintiff. (*McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104; *Lortz v. Connell* (1969) 273 Cal.App.2d 286, 290.)

In the Third Amended Complaint, ASAP alleged that there were oral agreements that modified or supplemented any written agreements signed by the parties on August 29, 2002. When it sustained the demurrers to the breach of contract cause of action with leave to amend, the trial court ordered that the Fourth Amended Complaint "must allege the material terms of the oral agreement with specificity."

Rather than attempt this straightforward and simple amendment to a basic breach of contract claim arising from the acquisition and finance of a single photocopier, ASAP instead took the fraud and unfair business practice language from the already dismissed tort claims and inserted it nearly wholesale into the breach of contract cause of action alleged in the Fourth Amended Complaint. This amendment did nothing to clarify the breach of contract claim and in fact made it more ambiguous and difficult to understand.

As a general observation, the Fourth Amended Complaint, like its previous iterations, is rambling, argumentative, largely nonchronological, imprecise in its use of language, and ungrammatical. It is difficult to follow and understand, even after multiple readings. Specifically, though, the breach of contract cause of action suffers from the following fatal defects: (1) it does not provide with any specificity the terms of any oral modifications or supplements to the written agreements, even though it ultimately alleges that the agreements between the parties were express, implied, written, and oral; (2) the allegations routinely refer to the "defendants" and fail to differentiate the conduct attributable to each; (3) because of the routine use of the plural and generic "defendants," it is impossible to determine which defendant agreed to what and which defendant did what in terms of occasioning any alleged breach; and (4) the inclusion of superfluous paragraphs – literally verbatim – from the previous unfair business practice and fraud causes of action further obscures the substance of the contract and nature of the breach alleged by ASAP.

Further, there was no abuse of discretion in the trial court's refusal to grant leave to amend this cause of action. ASAP failed to oppose the demurrer or formally ask for leave to amend. This was ASAP's fifth attempt to draft a valid breach of contract claim. The trial court, after sustaining the demurrer to the Third Amended Complaint with leave to amend, told ASAP specifically what needed to be alleged in the next complaint. ASAP chose to disregard that suggestion and, instead of clarifying the cause of action, obscured it further through the use of generic language and wholly superfluous allegations related only to previously dismissed causes of action. Under the circumstances, the trial court could only conclude that ASAP was unable, or wholly unwilling, to amend the complaint to state a proper cause of action for breach of contract. The trial court did not err by refusing leave to amend.

3. The Claim for Declaratory Relief

The trial court also sustained the demurrers without leave to amend as to the final cause of action for declaratory relief. ASAP argues to do so was error because the court had overruled the previous demurrer to this cause of action as alleged in the Third Amended Complaint.

ASAP's argument is not persuasive. First, ASAP chose not to oppose the demurrer to the Fourth Amended Complaint. Second, nothing prevents a court from reversing itself if it determines that a prior ruling was in error. (*Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 389.)

Finally, and most importantly, the claim for declaratory relief sought construction of the lease agreement, which by ASAP's own assertions could only be properly interpreted as part of a series of agreements, both written and oral, express and implied. When it sustained the demurrers to the breach of contract claim, the trial court addressed ASAP's trial counsel:

> "I am trying, as I said at the outset, as hard as I can to try to figure out what each of these entities are [*sic*] accused of. Because of the way you insist on writing the complaint, because of your insistence on keeping these irrelevant allegations in the complaint after the previous rulings, I can't say what any one of them – what agreement existed, whether it was written, oral or implied, and what they allegedly did to breach it."

The trial court sustained the demurrers to the breach of contract cause of action because it could not, based upon the allegations, determine which party did what act in violation of which contractual obligation. The claim for declaratory relief was dependent upon this contract claim and upon a contract definite enough to be construed: the failure of the breach of contract claim by definition doomed the claim for declaratory relief. The trial court did not err.

C. The Striking of the Fifth Amended Complaint

ASAP argues that it was an abuse of discretion to strike the Fifth Amended Complaint because section 472 gave it the right to amend if the demurrers filed against the Fourth Amended Complaint had not yet been heard. We disagree.

Section 472 provides that "[a]ny pleading may be amended *once* by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon." (Italics added.) The obvious answer to ASAP's contention is that section 472 does not apply because ASAP had already exercised its single amendment as of right when it filed its First Amended Complaint after filing, but before serving, its original complaint. Section 472 is also inapplicable because at the time ASAP amended the Fourth Amended Complaint by filing its Fifth Amended Complaint, multiple demurrers had already been heard *and* sustained to prior iterations of the complaint. ASAP's interpretation of section 472 is nonsensical: it would allow a plaintiff endlessly to delay hearing of a demurrer and possible dismissal by simply filing an amended complaint every time a demurrer to an earlier complaint was filed.

Barton v. Khan (2007) 157 Cal.App.4th 1216, cited by ASAP, is inapposite. In that case, the plaintiff attempted to file a *first* amended complaint pursuant to section 472 after one defendant had answered but others had only demurred and were awaiting hearing on the demurrers. Under those circumstances, Division Five of this court held that principles of judicial efficiency permitted the filing despite the answer by one defendant. (*Barton*, *supra*, at p. 1221.) The rationale of *Barton* would be turned upon its head if the court were to adopt the interpretation of section 472 urged by ASAP.

ASAP finally contends that the trial court abused its discretion when it denied an oral request for leave to amend at the hearing on the motion to strike. We find no abuse of discretion. As stated above, the trial court did not abuse its discretion when it denied leave to amend after sustaining demurrers to the Fourth Amended Complaint. The Fifth Amended Complaint did nothing to correct the problems of its predecessor; if anything, a review of the Fifth Amended Complaint shows that it continued to make the allegations of its predecessor even more unintelligible. ASAP demonstrated nothing which suggested it could or would allege a facially valid cause of action.

Given the circumstances present in this case, trial court did not err by striking the Fifth Amended Complaint without leave to amend.

D. The GE Discovery Orders

ASAP served GE with a request to produce documents on June 12, 2009. From this single document request, ASAP subsequently generated a series of motions to compel or for sanctions. ASAP contends that the trial court's rulings on the merits of the motions to compel, as well as its denial of sanctions in connection with the motions to compel, were an abuse of discretion.

ASAP also argues that the trial court erred when it failed to consider documents produced in connection with this June 12 request before ruling on respondents' motions to strike and demurrers to ASAP's First Amended Cross-complaint. Accordingly, this court will review the discovery proceedings before addressing the merits of the issues surrounding ASAP's First Amended Cross-complaint.

Preliminarily, this court observes that the content of ASAP's briefs related to these discovery issues, like the content of much of the rest of its briefs, is not helpful. ASAP's arguments with respect to these discovery issues are not clearly articulated and, with the exception of references to general standards of review on appeal, not supported by citations to relevant legal authority. Nevertheless, this court has attempted to decipher ASAP's apparent arguments related to these discovery issues, and answer each one.

1. The September 29 Discovery Order

ASAP challenged GE's alleged noncompliance with its June 12 document request in a motion to compel and for sanctions that was heard on September 29, 2009. ASAP

contends that the trial court's order on the motion was an abuse of discretion. ASAP's contention is incorrect.

On June 12, 2009, ASAP hand-served a request for production of documents upon GE. Consistent with section 2031.030, subdivision (c)(2), ASAP set the compliance date of July 13, 2009. GE served its response, containing both objections and specific factual responses, by mail, on Monday, July 13, 2009. GE served the verification for the responses, by mail, on July 24, 2009. GE produced documents in response to the request on July 16 and July 30, 2009. In its motion to compel, ASAP argued that the late verification rendered all of GE's responses untimely and that GE's objections, therefore, should be deemed waived.

The trial court disagreed, finding that GE's responses were timely and its objections preserved. The trial court did, however, order GE to produce again the documents already produced, and this time to separate them according to which request they were responsive. The trial court overruled some of GE's objections unrelated to privilege, but sustained others. Additional documents were to be produced within 10 days.

With respect to assertions of privilege, the court ordered GE to produce a privilege log insofar as it intended to withhold documents based upon attorney-client privilege. The court ordered GE to produce documents believed by it to be trade secrets, but subject to a protective order to be agreed upon by the parties within 10 days. If the parties could not agree, the burden was then on GE to timely move for a protective order, or face waiver of the trade secrets objection. The court denied both parties' requests for sanctions.

Before ruling on ASAP's various discovery-related contentions, some preliminary observations are in order. The management of discovery is ordinarily committed to the sound discretion of the trial court. (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612 (*Lipton*).) A reviewing court will not substitute its decision for that of the trial court so long as there is a basis for the trial court's decision that is supported by the evidence. (*Ibid.*; accord, *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1396-1397.) A trial court's decision granting or denying discovery will be set aside only

when there is "no legal justification" for the order. (*Lipton, supra*, at p. 1612.) Where a party seeks review of a discovery order on appeal from a final judgment rather than pursuant to prejudgment writ, it must demonstrate not only that the order was error, but also that the error was prejudicial. In this context, prejudice means that it is reasonably probable that a more favorable result would have occurred had the issue been properly decided by the trial court. (*Lickter v. Lickter* (2010) 189 Cal.App.4th 712, 740.)

With respect to the imposition of discovery sanctions, a trial court's discretion is similarly broad, and is subject to reversal only for manifest abuse exceeding the bounds of reason. (*American Home Assurance Co. v. Société Commerciale Toutélectric* (2002) 104 Cal.App.4th 406, 435.) When reviewing discovery sanctions, it is important to remember that the purpose of discovery is to allow parties to obtain all information relevant to a claim or defense. The purpose is not to trap the other party into a sanction that precludes trial on the merits. (See *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 781.) An order *denying* discovery sanctions ordinarily may be appealed as part of, and therefore from, a final judgment. (See *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887, 904-905 [court allowed interlocutory appeal of sanction denial because under the particular facts before it there might never be a final judgment from which the denial could otherwise be appealed].)

ASAP initially contends that because GE did not serve its verification within 30 days of the document request, the responses themselves were untimely. Therefore, ASAP continues, pursuant to section 2031.300, subdivision (a), the trial court should have deemed GE's various objections waived.

This argument may be disposed of summarily. A response that consists of only objections need not be verified. (§ 2031.250, subd. (a).) Where a response contains both objections and fact-specific responses, an untimely verification does not operate as a waiver of objections. (*Food 4 Less Supermarkets, Inc. v. Superior Court* (1995) 40 Cal.App.4th 651, 657-658.) The trial court did not err when it refused to deem GE's objections waived.

ASAP also complains that the trial court never ruled on the propriety of GE's assertion of a trade secret privilege. With respect to the trade secret issue, the trial court's

order was not an abuse of discretion. What the court essentially did was order the parties to attempt to resolve the trade secret issue between themselves before seeking an order from the court. The order clearly contemplated a hearing on the trade secret issue if the parties could not agree to a protective order and placed the burden on GE for so moving if a stipulation could not be reached. ASAP complains that because the trial court did not rule on the trade secret issue it "could not assess whether the documents requested are [*sic*] in the possession, custody, and control of GE." This argument is nonsensical. Nothing in the trial court's ruling prevented ASAP from obtaining the documents. Indeed, the trial court's order required GE to turn over the documents whether or not they involved a trade secret. The only issue was whether the parties would agree to a protective order or the court would impose one.

ASAP finally contends that the trial court abused its discretion when it refused to award it sanctions in connection with this motion to compel. Given the conduct of GE, described above, it was not an abuse of discretion for the trial court to deny sanctions against GE.

2. The December 7 Discovery Order

On November 6, 2009, ASAP moved for entry of default against GE as a sanction for its alleged noncompliance with the September 29 discovery order. In its motion, ASAP also asked for monetary sanctions and for an order requiring GE to produce the requested documents without further objection. On December 7, 2009, the trial court denied the motion as "without merit." ASAP's contention on appeal that the trial court's December 7 decision was an abuse of discretion is likewise without merit.

ASAP finds error in the trial court's ruling because GE (1) failed to provide a privilege log, (2) failed to move in a timely manner for a protective order, (3) failed to produce documents within 10 days of the September 29, 2009 hearing, (4) served supplemental responses with same or new objections after the previous motion to compel, (5) served supplemental responses which were not signed by counsel, (6) refused to produce "the instrument of assignment" between CFS and GE, and (7) harassed ASAP and Ali Tazhibi by including their confidential information in its opposition to ASAP's motion.

Preliminarily, even if we were to accept each of the assertions above as true, ASAP cites no legal authority for its position that these alleged violations, either individually or collectively, warrant the drastic sanction of default or that failure to enter default as a sanction is an abuse of discretion.

More importantly, the record itself undercuts the accuracy or significance of these assertions, which we address in order. There was no need of a privilege log because GE, although it asserted privilege objections in its supplemental response, also indicated that it would produce the documents in any event without waiving the privilege. Although GE had not obtained a protective order, it had attempted, unsuccessfully, to obtain a stipulated order with ASAP. Moreover, GE was in the process of drafting a formal request for a court protective order when ASAP interrupted it by serving the immediate motion for sanction of default. GE did not produce documents within 10 days of the September 29 hearing date as ordered, but did produce them on October 20, 2009. Although a violation of the discovery order, late production, under the circumstances, did not warrant the sanction of default. GE's supplemental responses were not signed by counsel but were verified by its representative. Again, to the extent this violates a discovery statute, it did not warrant the sanction of default. ASAP's claim that GE refused to produce the "instrument of assignment" is flatly contradicted by the record: GE did produce the document as part of Exhibit A to the supplemental responses. Finally, the contention that GE included confidential information of ASAP or Ali Tazhibi for the purpose of harassment misinterprets the trial record, as will be discussed below in connection with GE's motion to strike ASAP's abuse of process claim.

Based upon the reasons described above, we find no abuse of discretion in the trial court's refusal to enter default against GE as a sanction or to compel further responses from GE. Given these circumstances, we also find the court did not abuse its discretion when it refused to award ASAP monetary sanctions in connection with this motion.

3. The January 29 Discovery Order

On December 9, 2009, two days after the trial court denied its November 6, 2009 motion for sanction of default, ASAP filed yet another discovery motion, this time to compel further responses to the document request and for sanctions. On January 29,

2010, the trial court denied ASAP's motion, in part because it was an effort to relitigate issues already raised in the November 6 motion.

We have reviewed the record below and agree with the trial court: the December 9 motion was essentially a rehashing of the issues raised in the November 6 motion. It was not an abuse of discretion for the trial court therefore to deny it. Likewise, the court did not abuse its discretion when it refused to award ASAP monetary sanctions in connection with this motion.

4. The March 4 Protective Order

On March 4, 2010, the trial court granted GE's formal request for a protective order encompassing trade secret documents. On appeal, ASAP argues that the trial court's order was error for a variety of reasons. None of those contentions has merit. Again, because of the nature of ASAP's contentions, a relatively detailed procedural summary follows.

At the January 29, 2010 hearing on ASAP's earlier motion to compel, GE stated that because it could not reach an agreement with ASAP about the protective order, it would have to file a motion for a formal court protective order. The trial court set March 4, 2010, as the hearing date for this protective order request.

On February 3, 2010, GE filed its motion for a protective order. In its motion, GE identified only two documents that were being withheld pending a protective order: (1) a program and servicing agreement between CFS and Mellon Lease Corporation and (2) the "Canon Program" standard operating procedures. ASAP filed its eight-page opposition to GE's motion on February 19, 2010. Three days later, on February 22, 2010, ASAP filed a notice indicating that the prior opposition was "incorrect" and that it was now filing a 12-page opposition to GE's motion. In its "notice," ASAP asserted that the correct copy had been originally served upon GE.

On March 4, 2010, the trial court granted GE's request for a protective order. The court signed GE's proffered "alternative" protective order which required production of

the two documents subject to the terms of the order.[5] In its ruling, the trial court found ASAP's opposition to be untimely. The court stated it would not consider it, but added that even if it were considered, the court's ruling would not change.

Section 2031.060, subdivision (b)(5) allows a trial court, for good cause shown, to issue orders to protect trade secrets from unnecessary disclosure during discovery proceedings. The decision to issue a protective order, as well as the precise language contained in any order, are largely discretionary with the trial court. (*Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 Cal.App.4th 584, 588.) Such orders will not be reversed absent an abuse of that discretion. (*Ibid.*)

ASAP first contends that the March 4 protective order is "void on its face": it argues that the protective order (1) was never provided to its counsel at a prior "meet and confer"; (2) encompassed confidential information of CFS, an entity that itself had not asked for a protective order; (3) required any third parties who accessed the information to agree not to use it for any purposes unrelated to the immediate litigation; and (4) recited agreements between the parties that had not been reached. Like many of ASAP's arguments, this one is entirely conclusory and fails to cite to any specific legal authority. We therefore treat it as waived. (*McComber*, *supra*, 72 Cal.App.4th at p. 522; *Kim*, *supra*, 17 Cal.App.4th at p. 979.)

Next, ASAP argues that the motion for a protective order was not "promptly" brought within the meaning of section 2031.060, subdivision (a). A review of the trial record cited above establishes the following: (1) consistent with the trial court's September 29 discovery order, GE attempted to obtain a stipulated protective order with ASAP; (2) when ASAP rejected the proposed agreement, GE, consistent with the September 29 order, began drafting a formal motion for a protective order; and (3) GE's efforts to complete that motion were interrupted by ASAP's November 6 motion for sanction of default and December 9 motion to compel and for sanctions. Any noncompliance by GE with the promptness requirements of section 2031.060,

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[5] The order signed was an "alternative" order because GE also requested an order that did not require it to produce the documents at all. The trial court denied the request for this order and, as described above, signed the alternative order.

subdivision (a) was occasioned by ASAP's own overly litigious conduct, not dilatory conduct by GE.

Next, ASAP argues that the trial court should not have granted the March 4 protective order because GE failed to comply with the "meet and confer" requirements of section 2031.060, subdivision (a). ASAP's assertion is not supported by the record: GE made repeated efforts to attempt a stipulated protective order before finally seeking a court order.

ASAP next contends that the court's March 4 protective order violated California Rules of Court, rules 2.550 and 2.551. These rules express the general principle that court records, unless sealed, are presumed to be open. (Rule 2.550(c).) Both rules also set forth specific procedures and court findings required before records may be filed under seal.

It is arguable that these rules do not apply to the immediate situation. (See Cal. Rules of Court, rule 2.550(a)(3) ["[t]hese rules do not apply to discovery motions and records filed or lodged in connection with discovery motions"].) We need not, though, decide this issue, because these rules have nothing to do with litigant access to documents but to public access to documents used in legal proceedings. (See Advisory Com. com, 23 pt. 1A West's Ann. Codes, Rules (2006 ed.) foll. rule 2.550, p. 143 [the rules "recognize the First Amendment right of access to documents used at trial or as a basis of adjudication"].) Even if these rules were violated, which we do not find, any such violation did not affect ASAP's ability to use the documents to advance its interests in this litigation. Accordingly, we find ASAP's contention in this regard wholly irrelevant to any appellate issue related to the merits of this litigation.

ASAP next argues that the trial court erred when it found ASAP's opposition untimely and refused to consider it. This issue is moot since the trial court affirmatively stated that even considering the opposition would not have changed its decision.

ASAP finally argues that the trial court erred when it refused to award monetary sanctions against GE. Given our decision affirming the trial court's rulings on the merits of the motion, ASAP's request for sanctions was also correctly denied.

E. ASAP's First Amended Cross-complaint

As mentioned above, the trial court granted motions to strike ASAP's First Amended Cross-complaint by CBS and CFS and deemed their demurrers moot as a result. The court granted the motion to strike the first cause of action by GE and Hemar. It also sustained their demurrers to the cross-complaint as a whole. ASAP's contention that the trial court erred in making these rulings is without merit.

1. Judicial Notice of Discovery Documents

ASAP first contends that the trial court erred by deciding the demurrers and motions to strike without first taking judicial notice of various sealed discovery documents that it lodged with the court. ASAP's contention is without merit.

The trial court heard the various motions to strike and demurrers to ASAP's First Amended Cross-complaint by CFS, CBS, and GE/Hemar on March 23, 24, and 25, 2009, respectively. On March 22, ASAP lodged, under seal with the court, two documents produced by GE pursuant to the March 4 protective order: (1) the "Program and Servicing Agreement by and between CFS and Mellon leasing company" and (2) "GE's standard operating procedures for the Canon program."[6] The notice of lodging did not specify the purpose for which these documents were being lodged.

On March 23, ASAP filed an ex parte application seeking (1) an order compelling GE to turn over documents, (2) an order taking GE's motion to strike and demurrer - then set for March 25 - off-calendar, and (3) an order to show cause hearing why sanctions should not be imposed against GE. The premise of this application was that the two documents lodged under seal the day before were not complete and GE was in violation of the court's prior discovery order. The trial court denied the application, finding no good cause.

The same day, during the hearing on CFS's demurrer and motion to strike, ASAP asked the trial court to consider the documents lodged on March 22. The trial court

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[6] ASAP identified the sealed documents lodged with the court as described above. We assume these two documents are the program and servicing agreement between CFS and Mellon Lease Corporation and the "Canon Program" standard operating procedures identified by GE in its motion for the March 4 protective order.

refused to do so, finding they had not been properly filed or lodged with the court for that purpose.

On March 24, ASAP filed its notice that the documents lodged under seal on March 22 were to be considered "for all matters and hearings of any nature in this case." At the hearing on CBS's demurrer and motion to strike the same day, the trial court refused to consider them, finding the notice untimely.

On March 25, at the hearing on GE's demurrer and motion to strike, the trial court again refused to consider the documents, finding the notice untimely.

In its appeal, ASAP contends that the trial court violated due process when it refused to consider these documents before ruling on the demurrers and motions to strike. ASAP's argument in this regard is entirely conclusory. It does not articulate in any way whatsoever how consideration of these documents would have been material to the trial court's decisions on the demurrers and motions to strike. It is therefore waived. (See *McComber*, *supra*, 72 Cal.App.4th at p. 522; *Kim*, *supra*, 17 Cal.App.4th at p. 979.)

Moreover, ASAP does not in any way attempt to excuse or explain the dilatory or vague nature of the notices it filed below. By its own admission, ASAP received the two documents on March 16, 2010. This court will take judicial notice that March 16, 2010, was a Tuesday. ASAP, however, waited until March 22, the day before the hearings related to the First Amended Cross-complaint were to begin, to lodge the documents with the trial court. Even then, ASAP did not specify the purpose for which the documents were being lodged. Even its ex parte application the next day did not ask that the documents be considered by the court on the pending demurrers and motions. It was not until March 24, after the trial court advised ASAP that the documents were not properly lodged or noticed, that ASAP attempted to give some type of proper notice. Under these circumstances, it was not error for the trial court to refuse to consider them.

2. The Motions to Strike by CBS and CFS

When the trial court granted the motions to strike by CBS and CFS, it found that the First Amended Cross-complaint "is not drawn in conformity with the laws of this state and is a violation of the court's previous orders sustaining the demurrers to [ASAP's] complaints." The trial court did not abuse its discretion.

Section 436, subdivision (b) allows the trial court, upon proper motion, to "[s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." A trial court's decision to strike a pleading is reviewed for abuse of discretion. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1282.) Discretion is abused only when the trial court, upon consideration of all the circumstances, has exceeded the bounds of reason. (*Ibid*.)

ASAP initially argues that CFS's motion was untimely. ASAP does not articulate its reasoning in support of this argument. This court will therefore treat that argument as waived. (See *McComber*, *supra*, 72 Cal.App.4th at p. 522; *Kim*, *supra*, 17 Cal.App.4th at p. 979.)

ASAP next argues that its original cross-complaint was compulsory pursuant to section 426.30. It then cites *Mott v. Mott* (1890) 82 Cal. 413 (*Mott*), a case that stands for the unremarkable proposition that a defendant's cross-complaint remains active even after the dismissal of the original complaint against her. (*Mott*, at p. 420.) ASAP does not articulate its argument based on section 426.30 and *Mott*, but seems to be saying that because the First Amended Cross-complaint is a separate action, the original complaint and various amendments to it, as well as the litigation that ultimately resulted in the dismissal of the original action, are wholly irrelevant to a motion to strike the First Amended Cross-complaint.

First, in terms of compulsory cross-complaints, section 426.30 would arguably apply only to a cross-action by ASAP against GE, the party that filed the first cross-complaint. On its face, section 426.30 has no application whatsoever to cross-actions by ASAP against CBS, CFS, or Hemar. (See § 426.30, subd. (a).)

Second, ASAP's apparent construction of *Mott* is wholly at odds with section 436 and the case law construing it. In *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157 (*Ricard*), plaintiffs filed a second, separate case alleging a conspiracy claim after the trial court denied them leave to amend their original action to add that claim. The trial court sustained a demurrer to the second case without leave to amend. (*Ricard*, at pp. 159-160.) The Court of Appeal upheld the trial

court's decision to sustain the demurrer without leave to amend, but added that the trial court also could have granted a motion to strike:

> "A trial court has the authority to strike sham pleadings, or those not filed in conformity with its prior ruling. [Citations.] With almost frightening candor appellants acknowledge that the present suit was filed solely to circumvent the court's prior adverse ruling. Consequently it could properly be struck and in so doing, the court did not, as appellants here assert, improperly set itself up as a gatekeeper to control all judicial access." (*Ricard, supra,* 6 Cal.App.4th at p. 162.)

A review of the record below suggests that a similar motive underlies ASAP's filing of the original cross-complaint and the First Amended Cross-complaint. Both of ASAP's cross-complaints allege the same general course of conduct and, often, the same language verbatim, as that alleged in support of the tort causes of action contained in the Third Amended Complaint. Both of the cross-complaints appear to be an attempt by ASAP to resurrect the claims previously dismissed by the trial court when it sustained the demurrer to the Third Amended Complaint without leave to amend the tort causes of action. Moreover, that ASAP technically pleaded different causes of action based on those identical facts in the cross-complaints is immaterial: though there may be multiple theories upon which recovery may be sought, one injury gives rise to one claim for relief. (*Ricard, supra*, 6 Cal.App.4th at p. 162.) If ASAP disagreed with the trial court's ruling on the demurrers to the Third Amended Complaint, its option was to abide by the ruling and raise the issue on appeal or by way of a writ, if procedurally available. It could not, as it did, take advantage of a cross-complaint filed by an adversary and use that as a procedural bootstrap to reanimate previously dismissed claims.

3. The Special Motion to Strike by GE and Hemar

Pursuant to section 425.16, the trial court granted the motion of GE and Hemar to strike the abuse of process cause of action alleged in ASAP's First Amended Cross-complaint. ASAP alleged the following acts by GE and Hemar in support of its abuse of process claim: (1) the filing of GE's original and first amended cross-complaint and (2) the filing of documents containing confidential information belonging to ASAP and

Ali Tazhibi as part of GE's opposition to ASAP's motion for sanction of default for noncompliance with the trial court's September 29 discovery order.

Not unexpectedly, the abuse of process claim alleged in ASAP's First Amended Cross-complaint is not a model of pleading clarity. With respect to GE's filing of its cross-complaints, though, it appears that ASAP contends that GE knew it had no valid right of assignment from CFS and therefore knew it had no valid right to collect payments due pursuant to ASAP's agreement with CFS. Thus, ASAP's argument apparently goes, GE knew it had no valid right to sue ASAP pursuant to the contract and the cross-complaints can only be considered intentional harassment.

ASAP's abuse of process theory based upon the filing of the discovery opposition is even less clear. In its opposition to ASAP's motion for sanctions, GE included as an exhibit copies of documents it had produced pursuant to ASAP's document request. Although ASAP does not specifically so state, apparently some of those exhibits contained personal or confidential information pertaining to ASAP the business or Ali Tazhibi the individual. ASAP now seems to contend that the inclusion of this confidential information was intentional and for the purpose of harassment and retaliation.

Section 425.16, subdivision (b)(1) allows a special motion to strike causes of action which arise from the exercise of a person's federal or state constitutional right to petition or free speech. Although the statute refers to the rights of a "person," it also applies to private and governmental entities. (See *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114-1115.) Subject to exceptions not applicable in this case, the statute also allows for the recovery of attorney's fees and costs incurred in connection with a successful motion to strike. (§ 425.16, subd. (c)(1).)

The trial court must engage in a two-step process when deciding a special motion to strike. First, the *defendant* must establish that the challenged cause of action arises from protected activity. To do so, the defendant must demonstrate that the acts alleged "were taken 'in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*), quoting

§ 425.16, subd. (b)(1).) If the defendant makes the requisite showing, the motion to strike must be granted unless the *plaintiff* can show a probability of prevailing on the claim. (*Ibid.*; see also § 425.16, subd. (b)(1).) When making its decision regarding the strength of a plaintiff's claim, the trial court can consider the pleadings and any supporting or opposing affidavits. (*Equilon*, at p. 67; see also § 425.16, subd. (b)(2).)

To encourage participation in matters of public interest, section 425.16, by its express terms, is to be construed broadly. (*Equilon, supra*, 29 Cal.4th at p. 60; see also § 425.16, subd. (a).) An appellate court reviews the trial court's decision on a special motion to strike de novo. (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456.)

Initially, then, we must determine whether the acts alleged against GE and Hemar in the First Amended Cross-complaint were in furtherance of their right to petition or free speech in connection with a public issue. Both sets of acts alleged by ASAP involve pleadings or a motion opposition filed on behalf of a litigant, GE, by its attorney of record, Hemar, in pending litigation. Clearly, then, these acts are in furtherance of GE's right to petition the courts. (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 316; see also § 425.16, subd. (e)(1).) Because Hemar was acting on behalf of GE as its attorney of record, its conduct too is encompassed by section 425.16: it would make no sense to protect the litigant but not the attorney representing the litigant under these circumstances. (See § 425.16, subd. (a) [to encourage participation in public matters, terms of section are to be construed broadly].) Thus, we find that the acts alleged against GE and Hemar were in furtherance of their constitutional right to petition the courts.

To defeat the motion to strike, ASAP, as discussed above, must prove a probability of success on the merits. Moreover, in making this showing, ASAP cannot simply rely on the allegations in the complaint. It must present evidence that establishes a prima facie case and that would be admissible at trial. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) The elements of an abuse of process claim are (1) the defendant contemplated an ulterior motive in using the court's process and (2) the defendant committed a willful act in the use of the process not proper in the regular conduct of the proceedings. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.)

To meet this burden, the only "evidence" ASAP provided to the trial court was (1) the declaration of its trial counsel; (2) its "Notice of Filing Fifth Amended Complaint;" (3) an April 2, 2002 fax from GE to CFS produced by GE during discovery; and (4) the August 3, 2005 assignment letter produced during discovery.

The only remarkable document of the four is the April 2, 2002 fax. The fax appears to approve potential assignment of a lease between ASAP and CFS to GE. It indicates the approval period will expire July 1, 2002. Although the April 2, 2002 date is nearly five months prior to the August 29, 2002 contract between ASAP and CFS, the document appears to bear the same application and lease number as the August 3, 2005 letter which purports to assign the August 29 contract from CFS to GE.

On its face, though, the April 2 fax also appears to pertain to a different photocopier since the monthly rate and total payment differ from the August 29 contract. Moreover, the fax also contains two handwritten notations that appear to refer to the August 29 contract. One reads, "Verbal approval from Jim [illegible last name and initials] 8/29/02" and "Dennis[:] increased in August ok to use that date [same illegible initials]."

ASAP contends that this document demonstrates a probability that it will prevail on its abuse of process claim. ASAP simply states, without articulating its reasoning, that the April 2 fax shows that GE (1) approved a lease that did not exist between ASAP and CFS and (2) then used the "judicial machinery to engage [in] collection based on a False Lease Assignment." Before the trial court, ASAP argued its probability of success in similarly conclusory terms: the April 2 fax "indicates that approximately 5 [*sic*] months before any alleged transaction between Canon Financial Services and ASAP Copy and Print/Ali Tazhibi that CFS had made an assignment which [*sic*] it did not have any contract with ASAP Copy and Print/Ali Tazhibi."

This fax, without more, does not establish ASAP's probability of prevailing on the merits. The document is ambiguous and there is no attempt to articulate what it establishes and how. Moreover, there is no attempt by declaration or otherwise to lay an appropriate foundation for it. What is not ambiguous is that ASAP signed a lease agreement with CFS on August 29, 2002. What is not ambiguous is that by letter dated

August 3, 2005, CFS assigned the benefits of that lease to GE. ASAP does not explain how the April 2 fax, whatever it is, somehow invalidates the 2005 assignment of a lease agreement executed in August 2002. Nor does it explain – even if one assumes there is an argument in support of invalidation – how it would be so clear cut as to demonstrate that GE knew it had no valid claim for collection and thus had abused process by filing a cross-claim. Simply stating that this document renders GE's collection claim invalid and, additionally, that GE knew that it did, does not make it so. ASAP has provided no reasoning or authority for its argument and, accordingly, has not met its burden.

Insofar as ASAP also relies on the confidential information filed in connection with GE's discovery opposition, this court is likewise not persuaded that ASAP has established a probability of success on the merits. A review of the record shows that GE attached the documents that it had produced as an exhibit to its opposition, in order to show compliance with the trial court's earlier order. The fact that GE failed to redact information from this exhibit, without more, shows only inadvertence, not malicious knowledge or intent. It does not rise to the level of establishing a prima facie case for abuse of process.

Based upon the above, we therefore find that the trial court properly struck the abuse of process claim in ASAP's First Amended Cross-complaint.

4. The Demurrer of GE and Hemar

After the trial court granted the motion to strike the abuse of process claim, it also sustained the demurrer to both that claim and the balance of claims alleged against GE and Hemar in the First Amended Cross-complaint. Because we agree with the trial court's ruling on the motion to strike, its decision to sustain the demurrer on the abuse of process claim is moot and need not be reviewed. We do however affirm the trial court's ruling on the demurrer with respect to the balance of the claims.

When ruling on the demurrer, the trial court was entitled to take judicial notice of its own file in the case, including the various amended complaints and its previous rulings on the demurrers and motions to strike filed against those complaints. (See *Ricard, supra,* 6 Cal.App.4th at p. 160; see also Evid. Code, § 452, subd. (d).) A

demurrer to even a facially valid claim may be sustained if the claim is filed to evade a prior court ruling. (*Ricard*, *supra*, at pp. 160, 162.)

For the same reasons, stated above, that the trial court properly granted the motions of CBS and CFS to strike the First Amended Cross-complaint, it also properly sustained the demurrer of GE and Hemar.

5. The Sanctions Award

After striking or dismissing the First Amended Cross-complaint, the trial court awarded monetary sanctions against ASAP's trial counsel in favor of CBS, CFS, and GE. The trial court awarded the sanctions pursuant to section 128.7, subdivision (b)(1) or, with respect to the motion to strike the abuse of process claim against GE and Hemar, pursuant to section 425.16, subdivision (c)(1). Although we sustain the trial court's award of sanctions, sanctions pursuant to section 425.16, subdivision (c)(1) cannot be awarded against ASAP's trial counsel and must be awarded against ASAP the party.

Section 128.7, subdivision (b)(1) provides that the execution of a pleading or motion by an attorney of record certifies that "[i]t is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If a trial court determines this provision has been violated, monetary sanctions, including attorney's fees, may be imposed against offending counsel. (§ 128.7, subds. (c) & (d).) A sanctions award is reviewed for abuse of discretion. (See *Olson Partnership v. Gaylord Plating Lab, Inc.* (1990) 226 Cal.App.3d 235, 240 [reviewing sanction order pursuant to § 128.5].)

We have reviewed the record below and find no merit to any of ASAP's contentions challenging the sanctions imposed by the trial court pursuant to section 128.7. There was no abuse of discretion.

Section 425.16, subdivision (c)(1) states that a defendant who succeeds on a special motion to strike "shall" be awarded reasonable attorney's fees and costs. Fees awarded pursuant to this section, however, are awarded against a party, and may not be awarded against a party's attorney. (*Moore v. Kaufman* (2010) 189 Cal.App.4th 604, 614.) To the extent the trial ordered ASAP's counsel to pay fees incurred in connection

with the special motion to strike, it erred. The fees should have been awarded against ASAP itself.

GE presented evidence that its counsel expended time amounting to $3,060 in attorney's fees in connection with the special motion to strike. Accordingly, the trial court's order is modified to reflect that $3,060 of $7,110 ordered in sanctions against ASAP's trial counsel in favor of GE are instead to be paid by ASAP pursuant to section 425.16, subdivision (c)(1). The balance, $4,050, remains payable by ASAP's trial counsel as sanctions, pursuant to section 128.7, subdivision (c).

Given our decision above regarding the sanctions imposed against ASAP or its trial counsel, we find no merit to ASAP's contention that its own request for sanctions should have been granted.

F. ASAP's April 15, 2010 Ex Parte Application

On April 15, 2010, ASAP filed an ex parte application to (1) vacate the March 4, 2010 protective order; (2) unseal documents subject to that protective order previously lodged with the court; (3) vacate the judgment submitted by CFS; (4) vacate the pending hearing date regarding the award of attorney's fees and to set a briefing schedule; and (5) vacate the final pretrial status conference. The court vacated the final status conference because the voluntary dismissal of GE's cross-complaint had effectively ended litigation on the merits of the various actions and cross-actions. The court denied the balance of the ex parte application because ASAP did not establish by way of declaration the need for an ex parte hearing,

The trial court's ruling was correct: ASAP did not, by declaration or otherwise, establish the irreparable harm or immediate danger required for an ex parte application. (See Cal. Rules of Court, rule 3.1202(c).)

G. Motions Pending After ASAP Filed Its First Notice of Appeal

The trial court took the following motions or other applications off-calendar because they were either filed after or pending hearing at the time ASAP filed its first notice of appeal: (1) the April 16, 2010 notice of intention to move for new trial and to vacate judgment or orders; (2) the April 19, 2010 motion to vacate orders and to unseal records; (3) the April 28, 2010 memorandum of points and authorities in support of the

motion to vacate judgment or orders; (4) the June 21, 2010 motion to unseal records and vacate orders; and (5) the July 1, 2010 motion to unseal records and vacate orders. The court found that the notice of appeal divested it of jurisdiction to hear these motions. On appeal, ASAP contends that the trial court retained jurisdiction to hear these various motions despite the notice of appeal. It asks us to deem the motions denied at the trial level and then vacate or reverse the orders or judgment complained of on the merits. Once again, ASAP has raised a meritless issue on appeal.

Pursuant to section 916, subdivision (a), "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order." The purpose of this statute is to protect the jurisdiction of the appellate court by preserving the status quo until the appeal is decided. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189.)

The stay provision of section 916, subdivision (a) does *not* stay proceedings on ancillary or collateral matters which do not affect the judgment or order appealed from, even though the proceedings may render the appeal moot. (*Varian Medical Systems, Inc. v. Delfino, supra,* 35 Cal.4th at p. 191.) Thus, it has been established that a motion for a new trial is collateral to the judgment and may proceed, despite an appeal from the judgment. (*Ibid*.; *Weisenburg v. Molina* (1976) 58 Cal.App.3d 478, 485-486.)

ASAP's first notice of appeal, filed April 30, 2010, sought review of orders or judgments "dated March 4, 9, 23, 24, 25, 2010, April 7, 15[,] 2010 and from other interim orders and the whole thereof."[7] ASAP's April 16 notice of intention to move for new trial or to vacate judgment and orders sought review of "orders or judgments . . . dated 3.4.10, 3.9.10, 3.23.10, 3.24.10, 3.25.10, and 4.2.10." Its April 19 motion to vacate

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[7] The only document in the appendix akin to an "order" or "judgment" dated April 7, 2010, is CFS's notice of entry of judgment which gave notice of the trial court's April 2, 2010 entry of judgment in favor of CFS. We therefore assume that the reference to an April 7, 2010 order in the first notice of appeal is a reference to the April 2, 2010 judgment entered in favor of CFS.

orders and to unseal, and its April 28 memorandum of points and authorities sought review of the same orders as the April 16 notice of intention.

ASAP may have chosen to characterize the April 16 notice as a motion for a new trial, but ASAP's choice of words, again, does not make it so. It is clear from a reading of ASAP's notice of intention, motion to vacate and unseal, and points and authorities referenced above that ASAP sought to vacate, in part, the very orders from which it appealed on April 30. Although ASAP filed these documents prior to the notice of appeal, each was still pending hearing when the first notice of appeal was filed. Therefore, pursuant to section 916, subdivision (a), the trial court had no jurisdiction to hear these motions. (*Weisenburg v. Molina*, *supra*, 58 Cal.App.3d at p. 486 [while trial court had authority to hear a motion for new trial, it had no jurisdiction to hear motion to vacate the judgment or for judgment notwithstanding the verdict].)

ASAP's June 21 motion to unseal and vacate sought to vacate the same orders, described above, dated March 4, 9, 23, 24, 25, and April 2. It also sought to set aside the May 5, 2010 forfeiture of jury fees, and to vacate orders dated May 3, 5, 10, 11, and June 8 related to the prevailing party/attorney's fees issues. ASAP's July 1 motion to unseal and vacate sought to vacate the identical orders as the June 21 motion. It also sought to vacate the April 15, 2010 order denying the ex parte application to unseal.

To the extent these motions sought review of the same orders embraced by the first notice of appeal, the trial court had no jurisdiction to entertain them and, correctly, took the motions off-calendar. Insofar as the motions sought review of additional orders not mentioned in the first notice of appeal, we find no abuse of discretion in taking these matters off-calendar: in its motions to vacate orders related to prevailing party/attorney's fees issues, ASAP provided no arguments that were not already considered by the trial court when the matters were originally litigated. Moreover, given the history of this litigation – specifically, the almost nonstop and repetitive filings by ASAP – the trial court would have been within its rights to find these motions to be sham pleadings subject to a motion to strike.

ASAP also contends that the various orders complained of in the motions were void. Thus, its argument proceeds, the court retained jurisdiction to review and vacate them regardless of the first notice of appeal. This contention is meritless.

Jurisdictional errors may be of two types: a court may lack fundamental authority over the subject matter, question presented, or party, making its judgment void, or it can merely act in excess of its jurisdiction or defined power, making the judgment voidable. (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56.) Orders which are *void* – as opposed to orders which are merely *voidable* – are a nullity and may be attacked at any time by parties or nonparties to the action. (*Moore v. Kaufman, supra,* 189 Cal.App.4th at p. 616.)

None of ASAP's arguments regarding the challenged orders or judgments establish that they were void. If we assume, for purposes of this argument, that ASAP's criticism of the various orders has merit, the orders are at best in excess of the court's jurisdiction and hence not void, but only voidable. Accordingly, the notice of appeal did divest the trial court of jurisdiction, as shown above.

H. The Award of Attorney's Fees and Costs

ASAP makes a number of arguments challenging the trial court's award of attorney's fees and costs to respondents. None of these arguments have merit.

1. The Trial Court Retained Jurisdiction

ASAP initially contends that its first notice of appeal divested the trial court of jurisdiction to hear matters related to an award of attorney's fees. We disagree.

The filing of a notice of appeal does not deprive the court of jurisdiction to award attorney's fees as a matter of costs pursuant to a contractual provision. (*Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 368, superseded by statute on other grounds as stated in *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1197; see also *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 360-361 [court retains jurisdiction to award attorney's fees under § 425.16 despite filing of notice of appeal].) An award of attorney's fees is a collateral matter which is embraced in the action but is not affected by the order or judgment from which an appeal is taken. (*In re Marriage of Sherman* (1984) 162 Cal.App.3d 1132, 1140; accord, *Bankes v. Lucas, supra,* at p. 368.) Accordingly, despite

the notice of appeal, the trial court retained jurisdiction to determine issues related to the award of attorney's fees and costs.

2. CBS, CFS and GE Are Entitled to Attorney's Fees and Costs

ASAP contends that CBS, CFS, and GE did not demonstrate a right to recover attorney's fees. This contention is likewise meritless.

"Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (Code Civ. Proc., § 1032, subd. (b).) Attorney's fees are recoverable by prevailing parties as costs under Code of Civil Proedure section 1032, subdivision (b) when authorized by contract. (Code Civ. Proc., § 1033.5, subd. (a)(10)(A).) Before the trial court awards attorney's fees pursuant to a contract, it must determine whether an enforceable contract with a provision for attorney's fees exists. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 607, but see *id.* at p. 611 [acknowledging that mutuality provisions of Civ. Code, § 1717 allow attorney's fees where party sued on contract with attorney's fees clause successfully defends by arguing that contract is inapplicable, unenforceable, or nonexistent].)

Civil Code section 1717 governs contractual attorney's fees provisions "[i]n any action on a contract." By operation of law, section 1717, subdivision (a) creates a "mutuality of remedy" with respect to attorney's fees provisions. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (*Reynolds Metals Co.*); *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870.) When a contract allows recovery of attorney's fees by only one party, section 1717, subdivision (a) operates to provide that remedy to any prevailing party, whether specified in the contract or not. (*Santisas v. Goodin*, *supra*, 17 Cal.4th at pp. 610-611.) Moreover, it also gives the right to attorney fees to a nonsignatory party who prevails if that party would have been liable for fees had he lost. (*Reynolds Metals Co.*, *supra*, at p. 128; *Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 780; *Montgomery v. Bio-Med Specialties, Inc.* (1986) 183 Cal.App.3d 1292, 1295.)

The lease agreement between ASAP and CFS contains a provision for attorney's fees at paragraph 25:

> "Customer shall reimburse CFS for all of its out-of-pocket costs and expenses incurred in exercising any of its rights or remedies under this Agreement or in enforcing any of the terms or provisions of this

> Agreement, including, without limitation, reasonable attorney's fees and expenses and fees and expenses of collection agencies, whether or not suit is brought. If CFS should bring court action, Customer and CFS agree that attorney's fees equal to twenty five percent (25%) of the total amount sought by CFS shall be deemed reasonable for purposes of this Agreement."

Although this provision is unilateral in favor of CFS only, the "mutuality of remedy" created by Civil Code section 1717 means the right created by this provision was available to ASAP and to any nonsignatories who ultimately prevailed in this action.

ASAP's various arguments to the contrary, CBS, CFS, and GE were the prevailing parties in this action since they obtained complete dismissal of all claims asserted by ASAP in its various complaints and cross-complaints. (Civ. Code, § 1717, subd. (b)(1) [the prevailing party "shall be the party who recovered a greater relief in the action"]; Code Civ. Proc., § 1032, subd. (a)(4) [prevailing party includes "a defendant in whose favor a dismissal is entered"].) In an effort to avoid the award of attorney's fees, ASAP advances a series of arguments, none of them meritorious. We address each argument in turn.

After striking the Fifth Amended Complaint on March 9, 2010, the trial court ordered "the case dismissed with prejudice pursuant to . . . section 581[, subdivision] (f)(1)(3), as to the complaint." ASAP argues that the trial court failed to determine the prevailing party or parties when it filed this order and therefore there is no basis for an award of attorney's fees. This argument is wholly specious: it overlooks the fact that although the case had been dismissed "as to the complaint," the case was still pending because the cross-complaints of both ASAP and GE had yet to be resolved. Under the circumstances, the failure to designate the prevailing party in the March 9 order did not prevent the trial court from later determining prevailing party status – which it did – once the related cross-actions had been resolved.

Next, ASAP contends that GE failed to file a timely memorandum of costs within 15 days of March 25, the date the trial court mailed its notice that ASAP's Fifth Amended Complaint had been stricken. (See Cal. Rules of Court, rule 3.1700(a).) Thus, ASAP continues, it was improper for the trial court subsequently to find GE to be a prevailing party and to award it attorney's fees as costs.

This contention does not warrant reversal of the attorney's fees award to GE for a number of reasons. First, the cross-complaints of GE and ASAP were still pending after the Fifth Amended Complaint was stricken and GE had not yet been determined to be the prevailing party. Thus, any claim for attorney's fees was premature. Second, GE subsequently did file a timely motion to be deemed the prevailing party for the award of attorney's fees. That motion included all of its billing and cost records, verified under oath, and was the functional equivalent of a memorandum of costs. Third, the trial court had discretion to extend the 15-day time period for an additional 30 days. (Cal. Rules of Court, rule 3.1700(b)(3).) GE effectively terminated the last remaining active claims in this case when its request for voluntary dismissal of its cross-action, submitted to the trial court on April 2, was executed and filed.[8] Its formal memorandum of costs was filed within 45 days of April 2.

ASAP next argues that awarding attorney's fees pursuant to the lease agreement was improper because it disputed, generally, the validity of the lease agreement as a whole and, more specifically, the contractual provision for attorney's fees. A review of the record in this case shows that ASAP continually claimed that (1) CBS and CFS were effectively one entity, (2) GE was acting in concert with them, (3) CBS and CFS entered into agreements with ASAP that were written, oral, express and implied, and (4) all three entities breached their contractual and other obligations to ASAP.

As mentioned above, the lease agreement with CFS, which is cited by ASAP in support of its various claims, contains an express provision allowing for the recovery of attorney's fees. Although ASAP denied receiving the page of this agreement which contains that provision, ASAP included a request for attorney's fees in the damage prayers for all of its complaints and both of its cross-complaints. ASAP, at least implicitly, asserted its rights to attorney's fees against CBS, CFS and GE under the agreements involved in this case. Had it won this case, ASAP, it is clear, would have demanded attorney's fees pursuant to the contract. Having seen its claims dismissed, it

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[8] The appendix on appeal includes only the request for dismissal and does not include a copy of the court-executed and filed entry of dismissal.

cannot now argue that there is no valid contractual provision allowing an award of attorney's fees.

ASAP also argues that since neither CBS nor GE were signatories to the lease agreement they cannot rely on that agreement as a basis for attorney's fees. As discussed above, this argument is wholly without merit. Had either CBS or GE been found liable pursuant to the agreement, fees would have been awarded against them. Under Civil Code section 1717, both are therefore entitled to fees even though they were not parties to the agreement. (*Reynolds Metals Co., supra*, 25 Cal.3d at p. 128.)

Next, ASAP contends that the 25 percent limitation in the attorney's fees clause prevents the respondents from receiving more than 25 percent of their actual attorney's fees. The clause, on its face, applies only if CFS brings an action. In this case, of course, it was ASAP who brought the action and thus the clause is inapplicable. To the extent ASAP's argument is that the "mutuality of remedy" created by Civil Code section 1717 means that since CFS was limited to 25 percent of actual attorney's fees on suits *prosecuted* by it, CBS, CFS, and GE should be limited to 25 percent of their actual attorney's fees in *defense* of a suit brought by ASAP, it is not persuasive.

The statutory construction of Civil Code section 1717 is to be governed by equitable principles. (*International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 224; *Rainier National Bank v. Bodily* (1991) 232 Cal.App.3d 83, 86; *North Associates v. Bell* (1986) 184 Cal.App.3d 860, 865.) CFS, or any other entity bound by the lease agreement can, when *prosecuting* a lawsuit, control their costs, including attorney's fees, by the choice of who to sue, when to sue, and on what claims to sue. CFS, or any other entity, cannot control who chooses to sue them and on what claims, when *defending* a lawsuit. It would be inequitable to limit attorney's fees where, as here, the respondents found themselves to be the objects – rather than the proponents – of a complicated and unwieldy lawsuit which was ultimately dismissed in its entirety.

ASAP also argues, insofar as the Fifth Amended Complaint and the First Amended Cross-complaint are concerned, that there was no prevailing party because both were stricken as sanctions against ASAP's trial counsel. ASAP's argument continues that "[u]nder CCP section 1034(a)(4) [*sic*] a sanction against a non-party does not

provide prevailing party status." First, we presume that the reference to section 1034(a)(4) is actually a reference to section 1032, subdivision (a)(4), which defines "prevailing party" for the purpose of awarding costs. Second, section 1032, subdivision (a)(4) includes within its definitions of "prevailing party," "a defendant in whose favor a dismissal is entered," which of course is what happened in this case after the Fifth Amended Complaint and First Amended Cross-complaint were stricken.

ASAP next contends that it was the prevailing party insofar as GE's dismissal of its own First Amended Cross-complaint is concerned, and should have been awarded attorney's fees in relation to that part of the litigation. This contention is meritless. Civil Code section 1717, subdivision (b)(2) provides that there is no prevailing party when a complaint is dismissed pursuant to a case settlement. We think the language of this provision, interpreted as it must be by equitable principles as discussed above, is broad enough to encompass what occurred in this case: a voluntary dismissal clearly designed to terminate unwieldy litigation after the party requesting dismissal has already prevailed on all claims against it.

In its briefs, ASAP makes additional arguments which it contends require reversal, modification, or apportionment of the award of attorney's fees and costs. This court has read and considered each one. They are repetitive of other arguments, unclear, or conclusory.[9] None are meritorious. We have also reviewed the amount of attorney's fees and costs awarded to each respondent and find none of the awards to have been an abuse of discretion. (See *Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th

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9 One argument ASAP does *not* raise is that the "mutuality of remedy" created by Civil Code section 1717 applies only to "any action on a contract." (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 615.) Although "any action on a contract" has been defined broadly to encompass noncontract claims that arise from a contract, there is at least an argument that some of the claims in this case may not be actions on a contract. (See, e.g., *Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 455-456; *Kangarlou v. Progressive Title Co., Inc.* (2005) 128 Cal.App.4th 1174, 1178-1179; *Topanga and Victory Partners v. Toghia*, *supra*, 103 Cal.App.4th at pp. 785-786.) We need not decide this issue, however, because ASAP did not properly raise it below and it is therefore waived.

73, 94.) Accordingly, we affirm the trial court's rulings awarding attorney's fees and costs to respondents.

I. The Forfeiture of ASAP's Jury Fees

ASAP contends that the trial court erred when it ordered ASAP's jury fees forfeited on May 5, 2010. ASAP argues that the first notice of appeal stayed any action with respect to the jury fees and, in any event, that they were forfeited in violation of "section 636.3."

The first notice of appeal argument fails because forfeiture of jury fees is clearly a collateral matter which is not affected by an appeal from a judgment or other order. With respect to the second argument, this court again presumes that ASAP meant to cite the correct statute involved, in this instance section 631.3. Regardless, it does not matter because ASAP's argument lacks merit. The last remaining cause of action terminated in this case when the April 2 request for dismissal by GE was entered. Although the appendix does not contain an entered and file-stamped dismissal, the index to the appendix does indicate dismissal was entered on April 5, 2010. More than 20 business days passed between April 5 and May 5. The forfeiture was therefore appropriate. (See § 631.3.)

J. The Trial Judge Did Not Demonstrate Actual Bias

Finally, ASAP contends that the various orders challenged on appeal must be reversed and remanded to a different trial judge because the judge below demonstrated actual bias.

We have reviewed the entirety of the record below and find no evidence whatsoever of actual bias by the trial judge. There is nothing in the record below that even suggests the appearance of a bias. Indeed, the record of the proceedings described in this opinion show that the trial judge exercised a great degree of patience and restraint. We find this contention to be without merit.

DISPOSITION

The trial court's March 25, 2010 order that ASAP's trial counsel pay $3,060 in sanctions to GE is modified to reflect that those sanctions are to be paid by ASAP the party. In all other respects, the judgment is affirmed. In light of our ruling on ASAP's

request for judicial notice (see fn. 1, *ante*), any documents lodged under seal with this court are to be returned to ASAP's trial counsel to be disposed of in accordance with the trial court's March 4, 2010 protective order.

Respondents are awarded costs on appeal.

SORTINO, J.*

We concur:

DOI TODD, Acting P. J.

CHAVEZ, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.